

BLACK HAWK RESOURCES CORP.

IBLA 80-799

Decided October 24, 1980

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting high bid in competitive oil and gas lease sale. W 71493.

Reversed and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: Competitive Leases

Although under the Departmental regulations a competitive bidder in an oil and gas lease sale, must, where there is another party in interest, submit the signed statements required by 43 CFR 3102.7, failure to comply with the regulation does not require rejection of the bid. This result follows because in noncompetitive offerings the critical element is determining the first qualified offeror. For competitive bidding, the amount of the bid replaces priority of filing as the dominant factor.

APPEARANCES: Ralph R. Wilkerson, President, Black Hawk Resources Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated June 27, 1980, by the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's high bid for parcel 29 of the competitive oil and gas sale held on June 4, 1980. The bid was rejected because appellant failed to certify as to acreage limitations under 43 CFR 3102.2-2 and to submit statements required under 43 CFR 3102.2-7(b), which provides:

A statement, signed by both the offeror or applicant and the other parties in interest, setting forth the nature of any oral understanding between them, and a copy of any written agreement shall be filed with the proper Bureau of Land Management office not later than 15 days after the filing of the offer, or application if leasing is in accordance with subpart 3112 of this title. Such statement or agreement shall be accompanied by statements, signed by the other parties in interest, setting forth their citizenship and their compliance with the acreage limitations of §§ 3101.1-5 and 3101.2-4 of this title.

An attachment to appellant's bid form indicated that Black Hawk Resources Corporation owned 66-2/3 percent of the bid and Juniper Petroleum Corporation 33-1/3 percent. Junipers's qualification file number was also given.

Appellant concedes on appeal that it inadvertently omitted to certify as to acreage limitations as required by 43 CFR 3102.2-2. Appellant further states that the division of bid ownership between it and Juniper, as indicated on the attachment, "was the extent of the verbal agreement" between the parties. Appellant suggests that the attachment satisfied the requirements of 43 CFR 3102.2-7.

[1, 2] 43 CFR 3120.1-4 specifically requires bidders for competitive leases to comply with the regulations in subpart 3102. Since Juniper was another party in interest, section 3102.2-7 required a statement signed by both Black Hawk and Juniper as to the nature of any oral agreement between them. It also required a statement, signed by Juniper, setting forth its citizenship and compliance with the acreage limitation. The instructions on the back of appellant's bid form fully advise the bidder of all regulatory provisos which must be met if a bid is to be properly executed.

The Board vis-a-vis noncompetitive offers has held that failure to file the statements required by 43 CFR 3102.2-7 must result in rejection of the lease offer. See, for example, H. J. Enevoldsen, 44 IBLA 70; 86 I.D. 643 (1979); William R. Curtis, 37 IBLA 124 (1978). The Secretary's duly promulgated regulations have the force and effect of law and must be complied with. See Elizabeth Pagedas (On Reconsideration), 40 IBLA 21 (1979), and cases there cited. At first blush, it might appear that since appellant failed to comply

with mandatory regulations the State Office properly did reject its bid.

In North American Coal Corp., 74 I.D. 209 (1967), the Department addressed itself to the failure of a high bidder to timely submit with his bid a statement of his citizenship and coal lease interests.

North American discusses the difference between competitive and noncompetitive offerings as follows:

The Department's usual rule, at least for noncompetitive dispositions of mineral leases or permits, is that an offeror who fails to comply with a mandatory requirement of a regulation is not a qualified applicant and is not entitled to priority until the defect is cured. Ruby Company, 72 I.D. 189 (1965); Virgil V. Peterson, A-30685 (March 30, 1967).

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Where competitive bidding is permitted, however, price replaces time as the primary criterion for determining who will be awarded a lease or permit. Competitive bidding is based upon the underlying assumption that all bidders have an equal opportunity to compete upon a common basis with other bidders.

North American argues that the integrity of the bidding system would be compromised if the Department permitted a late filing of a required statement. It points out that a bidder could withhold his deposit until he determined whether he wanted to complete his bid and then, after an opportunity to reevaluate the desirability of a lease, file or not file the deposit as he sees where his interest lies.

This argument assumes that all requirements are equally important so that none can be neglected lest some bidder gain an unfair advantage. We agree that if a bidder could withhold his bid deposit without penalty he would be in a

much better position than other bidders. However, since the consequences of permitting deviations in so important an aspect of competitive bidding as the bid deposit would be so destructive to the orderly conduct of lease sales, such a lapse would not be excused. See Malcolm N. McKinnon, A-29979, A-29996 (June 12, 1964).

A statement relating to citizenship and other holdings, however, is on a different footing. We must assume that the bidder is qualified or else there would be no reason for him to participate in the sale. If he is qualified, there does not seem to be any advantage accruing to him from failing to file the required statements.

The only penalty provided by the regulations for failure of a high bidder who has been awarded a lease to complete the steps necessary to its issuance, such as payment of the first year's rental, submission of a bond, signing the lease, is forfeiture of the bid deposit. 43 CFR 3132.4-3(b). Thus, every high bidder has an opportunity for a second guess if he is willing to part with his deposit, and one who has omitted to submit a statement required with his bid deposit has no option not open to any other high bidder.

The Comptroller General has recognized that failure to comply with a mandatory requirement of a bid invitation, even though prescribed by regulation, does not always necessitate rejection of the bid.

In a recent decision he restated the considerations pertinent to determining when deviations from the provisions of an advertisement for bids may be allowed:

Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids might [sic] result in failure of one or more bidders to attain the equal opportunity to compete on a common basis

with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the right of bidders to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive. 45 Comp. Gen. 221, 223 (1965), quoting 40 Comp. Gen. 321, 324 (1960). [Emphasis supplied.]

74 I.D. at 210-212.

That distinction is further mentioned in a footnote in Alaska Oil and Minerals Corp., 29 IBLA 224, 231 n.1, 84 I.D. 114, 118 (1977), as follows:

A key distinction was made in this decision [North American] between bids on competitive mineral leases and offers on

noncompetitive mineral leases. For noncompetitive mineral lease offers, strict compliance with regulations is required because the essential element is determining the first qualified offeror. For competitive lease offers, however, the amount of the bid replaces priority of filing as the determining factor. Id. at 211; Ballard E. Spencer Trust, Inc., 18 IBLA 25, 28 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976); Silver Monument Minerals, Inc., 14 IBLA 137, 139 (1974). [Emphasis in original.]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to BLM to afford appellant a reasonably limited opportunity to make the necessary showings, e.g., 30 days from service of notice. Upon compliance therewith the lease is to issue to appellant, all else being regular.

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Frederick Fishman  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

